No. 14-1146

IN THE

# Supreme Court of the United States

TYSON FOODS, INC.,

*Petitioner,*

v.

PEG BOUAPHAKEO, *et al.*, individually and on behalf of all similarly situated individuals,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## BRIEF OF *AMICUS CURIAE* CATO INSTITUTE IN SUPPORT OF PETITIONER


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## QUESTIONS PRESENTED

1. Whether differences among individual class members may be ignored and a class action certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the Fair Labor Standards Act, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample.

2. Whether a class action may be certified or maintained, or a collective action certified or maintained under the FLSA, when the class contains hundreds of members who were not injured and have no legal right to any damages.

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## INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, files briefs in the courts, and produces the *Cato Supreme Court Review*. This case is important to Cato because it concerns the misapplication of procedural rules to alter or evade the burdens of substantive law, raising substantial concerns regarding due process and the abuse of aggregate litigation.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Class and collective actions may be "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979), but they are no exception to the bedrock requirement of constitutional due process that a defendant have an opportunity to raise challenges and defenses to indi-

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[1]Pursuant to Rule 37.6, counsel for the *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this brief are filed with the clerk.

vidual claims. Lower courts, including the court below, have lost sight of that principle in sanctioning "trial by formula" cases, where liability and damages for individual class members are statistically extrapolated, rather than proven. The Court correctly rejected the use of that device in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), but further guidance is necessary to make clear that *Dukes* cannot be circumvented by more elaborate formulas or the presence of Fair Labor Standards Act wage and hour claims.

Rule 23's commonality and predominance requirements must be interpreted and applied consistent with the Rules Enabling Act and the Due Process Clause. Trial by formula where injuries are in fact individualized violates both. As to the Rules Enabling Act, formula-based class certification unlawfully alters the substantive rights of the parties, relieving individual class members of their burden to prove injuries and damages, while depriving defendants of the ability to challenge class members' showings and present individualized defenses. And that deprivation, in turn, violates defendants' due process rights. A formula cannot substitute for individualized evidence of liability, injury, or damages, except for when those questions truly are common—that is, when answering them for the class also answers them for individual class members in the same "one stroke." *Dukes*, 131 S. Ct. at 2551.

No less than Rule 23 class actions, collective actions under the Fair Labor Standards Act also must

comply with the basic tenets of due process. This court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), is not an exception to that rule, although lower courts have incorrectly taken it to be one. *Mt. Clemens*, a wage and hour action, involved the very kind of strict commonality that is absent in typical trial-by-formula cases and holds only that, where employees are in fact identically situated, individual damages calculations may properly rely on "just and reasonable inference." *Id.* at 687. That holding, however, provides no license for unbounded "extrapolation" of damages for individual claims that vary widely in their particulars. Indeed, due process principles forbid such formulaic treatment of liability and damages. And those same principles are reflected in Congress's amendment of the FLSA in the wake of *Mt. Clemens* to emphasize the individual character of claims and employers' procedural rights.

Finally, the defendant in this case, Tyson, is the proper party to raise all of these issues, including the problems inherent in certification and maintenance of a class that contains members who were not injured and are not entitled to damages. Tyson's interest is plain, given that prevailing on either of the questions presented in this case would result in decertification of the class or judgment in its favor. In addition, the presence of uninjured class members implicates questions of judicial power under Article III of the Constitution that this Court is obligated to address. An unfair allocation of the award among

class members could also injure Tyson's interest in the *res judicata* effect of the judgment against it. If defendants like Tyson are precluded from challenging abuses of the aggregate litigation mechanisms, then the same collective-action problems that justify class procedures will likely prevent anyone from doing so, to the ultimate detriment of individuals who have actually been injured.

In sum, the logic of the decision below chafes against the requirements of Rule 23, the Rules Enabling Act, the FLSA, and constitutional due process. It should be reversed.

## ARGUMENT

### I. "Trial By Formula" Offends Rule 23, the Rules Enabling Act, and Constitutional Due Process

Commonality and predominance are not just Rule 23 prerequisites to class certification, but also essential to ensuring that class-action litigation does not alter parties' substantive rights, in violation of the Rules Enabling Act, or infringe the defendant's right to raise individual challenges and defenses to claims, in violation of the Due Process Clause. These requirements demand that determination of a class's "common contention" must "resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Trial by formula, as the court below sanctioned, cannot paper over the failure of common issues of fact and law to truly predominate,

such as in wage and hour lawsuits where individual fact issues are central to assigning liability and damages.

To begin with, the Rules Enabling Act could not be clearer that rules promulgated pursuant to its authority "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Rules must "really regulat[e] procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, 14 (1941). The governing test is therefore "what the rule itself regulates: If it governs only 'the manner and the means' by which the litigants' rights are 'enforced,' it is valid; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights,' it is not." *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (plurality op.) (quoting *Mississippi Publ'g Corp. v. Murphree*, 326 U.S. 438, 446 (1946)). The *sine qua non* of a permissible procedural rule is that, while it may regulate "the process for enforcing [the parties'] rights," it does not "alter[] the rights themselves, the available remedies, or the rules of decision by which the court adjudicated either." *Id.* at 407–08 (surveying cases).

"Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims."

*Dukes*, 131 S. Ct. at 2561 (citations omitted). As *Dukes* recognized, Rule 23's commonality and predominance requirements carry out that command, by joining together only what is truly common among class members, so that the rights of neither class members nor defendants are altered when those common issues are adjudicated class-wide. *Id.* In that way, the "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). It is an appropriately "demanding" standard, *id.* at 624, one that the Rule's drafters anticipated would *not* be met in cases presenting "significant questions, not only of damages but of liability and defenses of liability,...affecting the individuals in different ways." *Id.* at 625 (quoting Adv. Comm. Notes, 28 U.S.C. App., p. 697).

After years of inconsistent practice in this area, the Court's recent decisions in *Dukes* and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), signaled a retreat from the "seduction of procedural efficiency" that has beset lower court treatment of class actions. *See* Saby Ghoshray, Hijacked by Statistics, Rescued by *Wal-Mart v. Dukes*: Probing Commonality and Due Process Concerns in Modern Class Action Litigation, 44 Loy. U. Chi. L.J. 467, 469 (2012).

In *Dukes*, the Court explained that plaintiffs cannot simply raise common *questions* to meet Rule 23's commonality requirement; they must demonstrate that *answers* to those questions are such that their

resolution will apply equally to the claims of all class members. 131 S. Ct. at 2551. On that basis, *Dukes* rejected a district court's "novel" plan to conduct a "Trial by Formula" wherein liability and damages would be determined for a "sample set of the class members" and then extrapolated out to the "entire remaining class," relying on multiplication "to arrive at the entire class recovery—without further individualized proceedings." *Id.* at 2561. That approach, the Court concluded, violated the Rules Enabling Act because it precluded Wal-Mart from "litigat[ing] its statutory defenses to individual claims" and thereby impermissibly abridged its rights. *Id.*

*Comcast* similarly held that class damages methodologies must be tied to the plaintiffs' liability theory and requires that "courts...conduct a 'rigorous analysis' to determine whether that is so." 133 S. Ct. at 1433 (quoting *Dukes*, 131 S. Ct. at 2551–52). *Comcast* makes clear that the potential efficiency of class-wide adjudication cannot justify certification of a class action premised on imprecise, unreliable, and amalgamated damages models. Taken together with *Dukes*, *Comcast* "instructs courts that the method by which...damages are calculated may not serve as an afterthought in the class certification analysis, as whenever damages calculations require significant degrees of individualized proof, defendants are entitled to respond to and address such variances—in

fact, due process requires it." *Jacob v. Duane Reade, Inc.*, 293 F.R.D. 578, 592 (S.D.N.Y. 2013).[2]

*Dukes* and *Comcast* illustrate how perfunctory application of Rule 23's commonality and predominance requirements can run afoul of the Rules Enabling Act by altering the parties' substantive rights. With loosened commonality and predominance standards, individual class members could "prove" claims without satisfying the statutory criteria—for example, as here, by substituting expert testimony concerning the "average" time other employees in different jobs spent donning and doffing gear for any evidence of the amount of time they actually spent at those tasks. Likewise, defendants would be deprived of their statutory right to be held liable only for violations of statutory obligations and their right to challenge individual claims and present individual-

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[2] Some lower courts have improperly confined *Comcast's* holding to the antitrust context. *E.g.*, *Neale v. Volvo Cars of N. Am., LLC*, No. 14-1540, 2015 WL 4466919, at *16 (3d Cir. July 22, 2015) ("A close reading of [*Comcast*] makes it clear that the predominance analysis was specific to the antitrust claim at issue."); *Ramirez v. Riverbay Corp.*, 39 F. Supp. 3d 354, 369 (S.D.N.Y. 2014) ("The relevance of the holding in *Comcast* outside the antitrust context is not yet clear[.]"). *See also Jacob v. Duane Reade, Inc.*, 293 F.R.D. 578, 581 (2013) (noting that courts "have grappled with the scope, effect, and application of Comcast' s holding, and in particular, its interaction with non-antitrust class actions"). This case presents an appropriate vehicle to clarify that *Comcast's* scope is not so limited and to affirm the heightened standard against which class damages models must be measured.

ized defenses. This is why a formula cannot be a substitute for individualized evidence of liability, injury, or damages, except for when those questions truly are common—that is, when answering them for the class also answers them for individual members in the same "one stroke." *Dukes*, 131 S. Ct. at 2551. The Rules Enabling Act requires no less.

So does constitutional due process. "Due process requires that there be an opportunity to present every available defense." *Am. Sur. Co. v. Baldwin*, 287 U. S. 156, 168 (1932). Thus, "[a] defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues." *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) (citing *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231–32 (2d Cir. 2008)). *See also Duran v. U.S. Bank Nat. Ass'n*, 325 P.3d 916, 935–36 (Cal. 2014) (affirming reversal of judgment for class plaintiffs in a wage and hour action where trial court's use of statistical sampling to establish class-wide liability deprived defendants of the ability to litigate individual defenses in violation of due process). When aggregate litigation procedures procedures abridge a defendant's ability to mount the same defenses that it could bring in individual suits, something is seriously wrong.

Yet due process concerns have sometimes received short shrift from lower courts overseeing class actions that use formulas or other non-individualized

sources of "proof" to evade individualized inquiry. *See, e.g., Hilao v. Estate of Marcos*, 103 F.3d 767, 774–87 (9th Cir. 1996) (affirming award of compensatory damages based on a statistical sample of class claims that was extrapolated to estimate the percentage of valid claims class-wide); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (reversing denial of certification premised on calculations based on payroll records); *Giles v. St. Charles Health Sys., Inc.*, 294 F.R.D. 585, 595 (D. Or. 2013) (certifying claims based on aggregate figures).

The Court should be aware that these problems also arise in cases in which commonality and predominance run aground on legal, rather than factual, shoals. *In re Rhone-Poulenc Rorer, Inc.*, for example, involved a district court's plan to consolidate over 300 hemophilia-related suits against drug companies into a single class action to be tried under a jury instruction that purported to "merg[e]" the negligence standards of all 50 states. 51 F.3d 1293, 1300 (1995). The Seventh Circuit rejected that gambit, finding that the alteration of substantive rights through what it called an "Esperanto instruction" "exceed[ed] the permissible bounds of discretion in the management of federal litigation[.]" *Id.* at 1297. Although aggressive, the district court's approach was not at all novel—similar approaches had been advocated in other cases, with inconsistent result. *See, e.g., In re Pharm. Indus. Average Wholesale Price Litig.*, 252 F.R.D. 83, 93 (D. Mass. 2008) (rejecting class plaintiffs' proposal to substitute generic fraud instruction

for over 30 separate state unfair and deceptive trade practice acts); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 423–24 (E.D. La. 1997) (denying certification in products liability action premised on violations of multiple state laws, noting that "composite instructions accounting for all of these differences would hazard a chaos that seems counterintuitive to the spirit of Rule 23"); *Tylka v. Gerber Products Co.*, 178 F.R.D. 493, 498 (N.D. Ill. 1998) (differing standards of proof, procedure, substance, and remedies in 50 state consumer fraud statutes overwhelmed common issues, precluding certification of a nationwide class).

While not unique in forgoing a rigorous predominance analysis, the decision below condoned a particularly egregious instance of trial by formula. Rather than require strict commonality and predominance, the Eighth Circuit upheld certification of a class consisting of employees whose individual circumstances differed substantially, such that classwide proof of liability and damages could not possibly reach the same results as individual trials. Pet. App. 1a–24a. Rather than require each plaintiff to prove liability and damages on an individual basis, it allowed extrapolation from averages based on an unrepresentative sample of employees. *See* Pet. Br. 8–9 (citing filings). It was not deterred by the presence of uninjured parties in the plaintiff class or by the lack of discernable means to separate them from those actually entitled to damages. Pet. App. 8a–10a. As a result of these and other shortcuts, the defendant

was precluded from challenging individual liability and damages claims, as well as from presenting individualized defenses.

None of this can be squared with Rule 23, the Rules Enabling Act, or the Due Process Clause. The Court should make clear that it meant what it said in *Dukes* and *Comcast* and that interests of convenience and efficiency, or even a court's view of what constitutes rough justice, are unequal to the fundamental rule-of-law and due process concerns that mandate strict adherence to Rule 23's commonality and predominance requirements.

## II. Due Process Requirements Also Forbid Trial by Formula in FLSA Collective Actions

In *Dukes*, this Court erected an absolute bar against trial by formula that deprives a defendant of its right to defend against individual claims in aggregate litigation. 131 S. Ct. at 2561. Nevertheless, the type of trial by formula that *Dukes* vanquished remains alive and well in a thriving corner of aggregate litigation—wage and hour collective actions brought under the Fair Labor Standards Act in conjunction with Rule 23 class actions. In those cases, *Dukes'* guidance has been inappropriately relegated to secondary status.

The court below, like many others, relied on *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), to support the use of averages or other aggregate figures to determine employer liability under the FLSA. This reliance on *Mt. Clemens* is wholly

misplaced, given what the case actually says. As with Rule 23 class actions, FLSA collective actions must adhere to basic tenets of due process.

### A. *Mt. Clemens* Does Not Authorize Trial by Formula

In *Mt. Clemens*, a group of pottery employees sued their employer alleging that they were deprived of compensation for the time they spent walking to their workstations and preparing for work. 328 U.S. at 684. The Court held such time to be compensable for all employees. Because it was undisputed that the employer did not provide compensation for those activities, the Court could "assum[e] that the employee has proved that he has performed work and has not been paid in accordance with the statute." *Id.* at 688. In other words, there was no question that all of the employees had been injured in the same fashion.

The only uncertainty in *Mt. Clemens* was "in the amount of damages arising from the statutory violation by the employer" based on the class-wide liability that had already been proven. *Id.* The Court resolved that problem by reasoning that, in the event liability is evident but the employer's records are inadequate to precisely calculate damages, an employee may "produce[] sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Id.* at 677. In particular, the employees' evidence, although aggregate in certain respects, showed that they were all required to perform the same preliminary and postliminary ac-

tivities, in the same period of time, for which they were not compensated. *See id.* at 690, 693–94 (discussing employees' evidence). Thus, *Mt. Clemens* stands only for the modest principle that, when liability has been shown and the employer's records are inadequate, identically situated employees may prove damages on a class-wide basis. Because the employees are identically situated, this is, in effect, identical to the *Dukes* "one stroke" standard. *See* 131 S. Ct. at 2551.

Yet many lower courts, including the court below, have relied on *Mt. Clemens's* "just and reasonable inference" language in recent cases to establish Section 16(b) class-wide liability and extrapolate damages.[3] Pet. App. 8a. In so doing, they bypass due process requirements when FLSA claims are involved, finding that *Mt. Clemens* permits employees to use an average-hours-worked metric to certify a class. That reasoning not only is contrary to *Mt. Clemens* itself, but to the due process requirements codified in collective action law after *Mt. Clemens*.

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[3] Based on Westlaw citation counts, of the 901 federal district and appeals court citations to the "just and reasonable inference" language of *Mt. Clemens*, 597 have occurred since 2005. By contrast, in the 10-year period immediately following *Mt. Clemens*, the "just and reasonable inference" language was cited 18 times. *See, e.g., Matarese v. Moore-McCormack Lines*, 158 F.2d 631, 637 (2d Cir. 1946) (citing *Mt. Clemens* to hold "[w]here the fact of damages is certain, the uncertainty of the amount will not prevent their being assessed").

Consider, for instance, the facts of the case below. "During a nine-day trial, plaintiffs proved liability and damages by using individual timesheets, along with average donning, doffing, and walking times calculated from 744 employee observations." Pet. App. 5a. The jury verdict provided a single gross distribution to "the class," the combined FLSA opt-ins and Rule 23 class members who sued under Iowa's state labor law. Pet. App. 1a. That verdict was $2,892,378.70, less than half the plaintiffs' "all or nothing" calculation of class-wide damages based on average donning and doffing times and individual wage records. Pet. App. 6a, 125a. The reduction ensured that hundreds of the class members who received compensation were in fact not injured according to the jury's verdict. Pet. App. 125a. (Beam, J., dissenting from order denying petition for rehearing *en banc*).

The Eighth Circuit permitted this type of "averaging" to establish liability on an individual basis because it misread *Mt. Clemens*: "For the donning, doffing, and walking in *Mt. Clemens*, testimony from eight employees established liability for 300 similarly situated workers." Pet. App. 11a. That interpretation of *Mt. Clemens* is incorrect and undermines employers' due process rights to assert statutory defenses to individual claims. Application of *Mt. Clemens* to adjudicate class liability has led to the point where the Eighth Circuit—in complete contrast to the teaching of *Dukes*—relied on statistical sampling to assign not just damages, but liability, to a com-

bined Rule 23 and Section 16(b) class comprised of employees with very different circumstances.[4] Pet. App. 13a–14a. *Mt. Clemens*, however, could reasonably assume liability for all workers based on the employer's failure to pay for their identical preliminary and postliminary activities, and only then did it allow a "just and reasonable inference" regarding damages. The fact and nature of damage were certain across the board. 328 U.S. at 687. And even then, it remanded the case "for the determination of the amount of walking time involved and the amount of preliminary activities performed," *id.* at 694, instructing that each employee must "prove[] that he has in fact performed work for which he was improperly compensated" and "produces sufficient evidence

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[4] This approach to combined litigation is what the dissent referred to as "homogenizing" the Rule 23 and FLSA procedures for trial. Pet. App. 14a. Here the melding of procedures followed the dictates of neither the FLSA nor Rule 23 and produced a pot of money that could not legitimately be distributed to the composite groups of employees. Indeed, the homogenization only worsened the constitutional deprivations. The jury awarded a lump sum verdict and provided no mechanism to allocate the judgment. This also raises significant Seventh Amendment issues relating to the determination of damages. Indeed, with respect to legal relief, there is a "Seventh Amendment right[] to have a jury determine[] the distinct and separable issues of the actual damages of each of the [absent] plaintiffs." *Cimino v. Raymark Indus.*, 151 F.3d 297, 321 (5th Cir. 1998).

to show the amount and extent of that work," *id.* at 688.[5]

*Mt. Clemens* was quite unlike the situation here, where it is certain that some employees were not injured at all. Pet. App. 121a ("[W]ell over half of the putative class employees in this case have not 'shown work performed for which [they were] not compensated.'") (Beam, J., dissenting from order denying petition for rehearing *en banc*) (quoting *Holaway v. Stratasys*, 771 F.3d 1057, 1059 (8th Cir. 2014)). Thus, under the guise of dispensing damages, the lower court here assigned liability where there was none, awarded damages where there were none, and did so relying on "evidence" that says nothing about individual workers' actual entitlements to relief. Whether any individual employee actually performed uncompensated work in this case requires individual analysis, which makes the Eighth Circuit's reliance on *Mt. Clemens* to permit the jury to statistically assign liability in the first instance and to extrapolate damages improper.[6]

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[5] As the Sixth Circuit recognized: "*Mt. Clemens Pottery* and its progeny do not lessen the standard for showing that a FLSA violation occurred. Rather, *Mt. Clemens Pottery* gives a FLSA plaintiff an easier way to show what his or her damages are." *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d. 567, 602 (6th Cir. 2009).

[6] Not only that, but as Judge Beam further pointed out, unlike *Mt. Clemens*, the employer here maintained "adequate attendance, assignment, equipment, work time and pay roll records" that "were available to each Tyson employee." Pet. App. 121a.

Properly understood, the approach taken in *Mt. Clemens*—finding class-wide liability before applying an inference to individual damages for identically situated employees—dovetails with the due process considerations articulated by this Court's contemporary class-action jurisprudence. An employer's due process rights are denied when liability is determined by statistical sampling that relieves individual employees of the burden of proving liability and damages and blocks individualized defenses. *Mt. Clemens* should not be stretched beyond recognition to permit such blatant due process violations.

### B. Post-*Mt. Clemens* Amendments to the FLSA Confirm the Centrality of Due Process Rights

Section 16(b) of the FLSA authorizes an employee to bring suit on behalf of "other employees similarly situated." 29 U.S.C. § 216(b). Section 16(b) actions, though, are neither class nor true representative actions. Congress amended Section 16(b) in 1947 in response to a wave of wage and hour representative litigation in the manufacturing sector.[7] Portal-to-

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Thus, whatever basis might exist to grant a just and reasonable inference for employees to rely on statistical sampling to establish damages is beside the point when the employer does supply adequate records.

[7] In *Mt. Clemens*, this Court construed the term "workweek" in the FLSA to "include[] the time employees spent walking from time clocks near a factory entrance to their workstations." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 21 (2005) (citing *Mt. Clemens*, 328 U.S. at 691–692). The Portal to Portal Act amendments were in

Portal Act of 1947, ch.52, § 5, 61 Stat. 84, 87–88 (1947) (codified at 29 U.S.C. § 216(b)). With those amendments, "the representative action by plaintiffs not themselves possessing claims was abolished, and the requirement that an employee file a written consent was added." *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989) (citing 93 Cong. Rec. 538, 2182 (1947) (remarks of Sen. Donnell)).

Senator Donnell, then Chairman of the Senate Judiciary Committee, articulated the rationale for the provision: "[I]t is certainly unwholesome to allow an individual to come into court alleging that he is suing on behalf of 10,000 persons and actually not have a solitary person behind him, and then later on have 10,000 men join in the suit, which was not brought in good faith, was not brought by a party in interest, and was not brought with the actual consent or agency of the individuals for whom an ostensible plaintiff filed the suit." *See Arrington v. Nat'l Broad. Co., Inc.*, 531 F. Supp. 498, 502 (D.D.C. 1982) (quoting 93 Cong. Rec. 2182 (1947)). *See also Dolan v. Project Const. Corp.*, 725 F.2d 1263, 1267 (10th Cir. 1984) ("The opt-in language of § 216(b) was a direct result of this clear congressional dissatisfaction with

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part a response to *Mt. Clemens'* merits holding based on a Congressional view that the FLSA had "been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities.' *Unexcelled Chem. Corp. v. United States*, 345 U.S. 59, 63 (1953).

the original class action provisions of the FLSA."); *United States v. Cook*, 795 F.2d 987, 993 (Fed. Cir. 1986) ("In the absence of any legislative history to the contrary, we find those remarks of Senator Donnell [about the problems with the prior representative actions] persuasive.").

Substantively, the amendments had "the purpose of limiting private FLSA plaintiffs to employees who asserted claims *in their own right* and freeing employers of the burden of representative actions." *Hoffman-La Roche Inc.*, 493 U.S. at 173 (emphasis added). Only those employees who affirmatively join the action and are deemed by the district court to be "similarly situated" within the meaning of Section 16(b) can receive monetary relief upon judgment. And only those employees who join are bound by the judgment. *Myers v. Hertz Corp.*, 624 F.3d 537, 542 (2d Cir. 2010) ("[P]laintiffs in FLSA representative actions must affirmatively 'opt in' to be part of the class and to be bound by any judgment."). This procedure maintains the employer's due process right to defend against individual employees' claims along with the due process rights of employees who wish to refrain from joining the lawsuit.[8]

In sum, the 1947 amendments to the FLSA reinforce defendants' due process rights and should not

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[8] The district court in a collective action has the discretion to determine the statutory meaning of "similarly situated" under the FLSA to decide whether the case can proceed collectively or on an individual basis.

be circumvented through devices that seek to move FLSA actions further from the employee-centric ideal that Congress intended.[9]

## III. The Defendant Is a Proper Party To Challenge an Aggregate Damages Award that Compensates Uninjured Class Members

The Court should reject any argument by Respondents that a defendant cannot challenge certification or maintenance of a class that includes members who suffered no injury at all. *See* Pet. App. 130a–131a (Benton, J., respecting denial of rehear-

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[9] Despite the 1947 amendments, FLSA collective actions are among the most-filed types of contemporary aggregate litigation. Plaintiffs' attorneys pursue FLSA collective litigation because it is relatively easy and lucrative. *See* Rachel K. Alexander, *Federal Tails and State Puppy Dogs: Preempting Parallel State Wage Claims to Preserve the Integrity of Federal Group Wage Actions*, 58 Am. U.L. Rev. 515, 541 (2009) (noting that FLSA conditional certification results in settlement pressure because it "signals the potential expansion of the case and the need for significant and expensive class-wide discovery"); Allan G. King, Lisa A. Schreter, Carole F. Wilder, You Can't Opt Out of the Federal Rules: Why Rule 23 Certification Standards Should Apply to Opt-in Collective Actions Under the FLSA, 5 Fed. Cts. L. Rev. 1, 10 (2011) ("Because conditional certification frequently subjects employers to 'mind-boggling' discovery, the costs and resources required to defend a case, even if only 'conditionally' certified, place enormous pressure on employers to settle prior to reaching the second, decertification step."). A Rule 23 class action may be added, as in this case, to broaden the relief available and expand potential employer liability because of the lack of a statutory opt-in requirement.

ing *en banc*). Particularly when formula-based aggregate damages are reduced in a *pro rata* fashion that calls into question the defendant's liability *vel non* to individual class members, the defendant is entitled to raise that issue so as to secure its own rights, enforce the limitations of Article III jurisdiction, and protect itself from the risk of future liability.

Whether or not defendants generally have a cognizable interest in the allocation of class-wide damages, *cf. Boeing Co. v. Van Gemert*, 444 U.S. 472, 481 n.7 (1980), Tyson does here. The plaintiffs' proof of class-wide damages consisted of expert testimony that applied two "average" donning and doffing times of 18 and 21.25 minutes to Tyson's payroll records. J.A. 139, 410, 417–18. Those average times, in turn, were based on another expert's analysis of a few Tyson workers and reflect a wide range of actual times—for donning, ranging anywhere from 12 seconds to ten minutes. J.A. 142–43. As the damages expert conceded, even small reductions in the calculated averages results in large reductions in the number of class members who were (in plaintiffs' view) injured, as individual members' work hours fell below 40 for a given week or they were fully compensated by the amounts that Tyson had already paid. J.A. 424–25. Based on this methodology—in particular, using the averages calculated by the other expert—she testified that class-wide damages were $6,686,082.36 for the Rule 23 class. J.A. 139, 410, 417–18. The jury, however, apparently did not

buy the average times and awarded damages of $2,892,378.70, less than half what plaintiff sought. J.A. 467. Due to the nature of plaintiffs' proof of damages, this means that some number of class members could not have suffered any injury recognized by the jury verdict.

As an initial matter, this issue is adequately supported by Tyson's interest in decertification of the class or entry of judgment in its favor. Tyson moved the district court, at the close of plaintiffs' case, to decertify the class or grant judgment as a matter of law because plaintiffs had not proved all class members were injured. J.A. 14 (Dkt. 270). That motion was denied, as was Tyson's renewed motion following the verdict. Pet. App. 30a (rejecting challenge because there was "not a complete absence of probative facts to support the conclusion, nor did a miscarriage of justice occur"). Because a decision for Tyson on this issue would undermine the judgment against it and could affect its ultimate liability, Tyson is a proper party to raise it.

That aside, Tyson may challenge the allocation of damages among class members for two additional reasons. First is to enforce the Constitution's case-or-controversy requirement. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Every "plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* (citations and quotation marks omitted). This applies equally to class

members, given that "Rule 23's requirements must be interpreted in keeping with Article III constraints." *Amchem*, 521 U.S. at 613. *See also Lewis v. Casey*, 518 U.S. 343, 357–58 (1996) (limiting relief in class action to that supported by standing). Indeed, "[t]his and every federal court has an independent obligation to consider standing, even when the parties do not call it into question." *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1454 (2011). A federal court would be required to consider its power under Article III to award damages to an uninjured party regardless of whether the defendant or anyone else raised the issue.

The second reason is that Tyson "has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985). A defendant "has an interest in ensuring it pays only legitimate claims" because, to the extent illegitimate payouts reduce relief to injured class members, they "could argue the named plaintiff did not adequately represent them because he proceeded with the understanding that [injured] members may get less than full relief." *Carrera v. Bayer Corp.*, 727 F.3d 300, 310 (3d Cir. 2013). In that instance, the defendant's reliance on *res judicata* would be placed in jeopardy; after all, "[w]hen class members are not adequately represented by the named plaintiff, they are not bound by the judgment." *Id.* (citing *Hansberry v. Lee*, 311 U.S. 32, 42 (1940)). *See also Pelt v. Utah*, 539 F.3d 1271, 1284 (10th Cir. 2008). Tyson may

face just that risk here, if employees with above-average donning and doffing times conclude they were undercompensated in favor of class members with no injury to speak of.

Finally, as a policy matter, it is at least troubling that class counsel here has "no basis for concern" about giving away a portion of the class award to uninjured class members at the expense of injured ones. BIO at 19. Someone ought to be concerned. And while Tyson's interests may be different from those of class members, its interest in securing appropriate compensation so as to take advantage of *res judicata* is aligned with that of injured class members, who stand to benefit from any additional compensation that would result from a fairer allocation of the class award. *See Carrera*, 727 F.3d at 310. By all indications, if Tyson does not raise this issue, no one will.

## CONCLUSION

To enforce the requirements of constitutional due process in the aggregate action context, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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